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No. 85-371

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GENESIS BROADCASTING LIMITED,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND BROADCAST COMMUNICATIONS, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF BROADCAST COMMUNICATIONS, INC. IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals for the District of Columbia Circuit properly reviewed the application by the Federal Communications Commission of the "renewal expectancy" principle in a comparative broadcast hearing?

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BRIEF OF BROADCAST COMMUNICATIONS, INC. IN OPPOSITION

Broadcast Communications, Inc. (hereinafter referred to as "BCI"),[1] respectfully opposes the petition for writ of certiorari submitted by Genesis Broadcasting Limited (hereinafter referred to as "Genesis") to seek review of a judgment of the United States Court of Appeals for the District of Columbia Circuit.[2]

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[1]BCI has no parent or affiliated companies; it is the parent of Broadcast Services, Inc.

[2]The Acting Solicitor General filed with this Court on September 13, 1985 a waiver by the United States Government of its right to file a response to the petition for certiorari in this case.

COUNTERSTATEMENT OF THE CASE

The Federal Communications Commission (hereinafter referred to as the "FCC") granted BCI's application for renewal of the license for FM station WOJO, Evanston, Illinois and denied the competing application filed by Genesis following a comparative hearing. The Commission observed that BCI had, during the pertinent period, devoted a percentage of its operating hours to nonentertainment programming which exceeded the average and median percentage of such operation by other commercial FM stations serving the Chicago area. The Commission concluded that this broadcasting record, coupled with a variety of programming efforts by BCI to discover and fulfill the needs and interests of listeners within the station's service area, supported a substantial renewal preference. The FCC specifically rejected Genesis's claims that BCI had provided only minimal service to its community of license. Genesis was awarded a preference for its proposal to involve its owners in the daily operation of the station which was nearly offset by the participation of a majority of BCI's owners in station management. Genesis also received a preference because it owned no other media interests, whereas BCI was, for decisional purposes, deemed to be the owner of an AM station which had in fact been sold before the hearing began. Both of Genesis's preferences were diminished by a comparative demerit assessed against it for carelessness and deliberate omissions in the filing and prosecution of its application.[3] On

[3]The FCC's decision substantially affirmed that of its Review Board. However, the FCC eliminated a strong preference which the presiding Administrative Law Judge and the Review Board had awarded BCI for its provision of the only nighttime Spanish language service throughout much of the station's service area. The FCC found that there was a public need for the programming format proposed by each applicant and concluded that neither was to be preferred on this basis.

balance, the FCC concluded that BCI's substantial renewal preference outweighed the preferences earned by Genesis as reduced by the demerit assessed against it.

Genesis appealed this decision to the Court of Appeals for the District of Columbia Circuit, which, after full consideration of the issues raised, affirmed the FCC's judgment without opinion.

REASONS FOR DENIAL OF THE REQUEST FOR ISSUANCE OF THE WRIT

This case presents no unique or unusual legal questions warranting review by this Court. It involves only Genesis's perception that the FCC has not properly applied licensing standards developed by the agency and approved by the federal courts to compare the past record of a broadcasting station operator with the untried promises of a challenging applicant. The FCC's judgment to grant renewal of license to BCI was rendered only after all of the pertinent comparative factors weighing in favor of and against each applicant were considered. The decision of the FCC was a reasoned judgment, explaining with specificity those factors which informed its ultimate conclusion. There is no reason, therefore, for the issuance of the writ of certiorari as requested by Genesis.

1. A Renewal Expectancy for Meritorious Past Broadcasting Service Is Inherent in the Principles of the Communications Act

The Court of Appeals for the District of Columbia Circuit, which has exclusive jurisdiction over appeals from FCC licensing decisions, 47 U.S.C. §402(b) (1984), has repeatedly recognized that there are "legitimate renewal

expectancies implicit in the structure of the Communications Act," *Greater Boston Television Corporation v. F.C.C.*, 444 F.2d 841, 854 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971), which are properly to be taken into account under certain circumstances in a comparison between an incumbent licensee and a challenging applicant.[4] This Court has also recognized the principle of a renewal preference, *F.C.C. v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 805-07 (1978), and acknowledged that the Congress has indicated its approval of the evaluation of existing licensees on a somewhat different basis from new applicants. *Id.* at 810-11, n.31. When the award of a sufficiently strong renewal preference is justified, it is legally permissible to grant renewal of license in favor of the incumbent even where the challenger has earned preferences under the other comparative criteria. *Central Florida II*, 683 F.2d at 508-09; *Victor Broadcasting*, 722 F.2d at 765. The award of a renewal preference of dispositive significance in this case does not, therefore, present a sufficient basis for review by this Court.

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[4]The F.C.C. has, for twenty years, applied a set of standard criteria in the assessment of comparative broadcasting cases. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965). The concept of a "renewal expectancy" is a refinement of those criteria designed to recognize that in a contest between a new applicant and an incumbent the comparison is between the untested promises of the former and the actual past performance of the latter; the evaluation of which of the applicants will better serve the "public interest, convenience and necesssity" requires the incumbent to suffer the deficiencies of its past record, but allows the licensing agency to recognize meritorious past performance through the award of a renewal preference. *Cowles Broacasting, Inc.*, 86 F.C.C. 2d 933, 1013-1015 (1981), *aff'd, Central Florida Enterprises v. F.C.C*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983) ("Central Florida II"); *Victor Broadcasting, Inc. v. F.C.C.*, 722 F.2d 756 (D.C. Cir. 1983).

2. The Renewal Preference Awarded BCI Was Based Upon the Strength of Its Past Record of Service and Was Properly Considered by the FCC Among All Pertinent Factors in the Comparison of the Applicants.

Genesis's principal contention seems to be that BCI failed to establish adequately the strength of its past record so as to merit the award of a renewal preference, *Petition* at 4, 7-8, and that the resultant decision must therefore have been premised exclusively upon a presumption of renewal in favor of the incumbent which impermissibly denied Genesis the comparative evaluation to which it was entitled. This claim mischaracterizes the FCC's decisional process in this case.

The FCC carefully considered the entirety of BCI's past record as the licensee of station WOJO. The agency adopted detailed findings and conclusions made by its Review Board with respect to the merits of BCI's service to its community of license and to its service area. *Broadcast Communications, Inc.*, 97 F.C.C.2d 61, 62 (1984). Among other things, the FCC observed that "BCI exceeded the average and median percentages of nonentertainment programming broadcast during the composite week by other commercial FM stations serving the Chicago area." *Id.* at 64. The FCC adopted the Review Board's analysis of BCI's presentation of news, information, other nonentertainment programming and numerous public service announcements responsive to issues of local concern. *Id.* at 63. The FCC's conclusion that BCI's past record, evaluated on comparative quantitative grounds with respect to the operation of other area stations and on qualitative bases, was a substantial one meriting a strong renewal preference is amply supported by record evidence.

As instructed by the courts, *Central Florida II,* 683 F.2d at 506-507, n.16; *Victor Broadcasting,* 722 F.2d at 760-61, the FCC did not rest its decision on this finding alone. The agency considered and adopted its Review Board's findings that Genesis was entitled to a narrow preference for its proposal to integrate both of its owners into the daily management of its operation; the strength of this preference was tempered by the fact that BCI too would integrate a significant (although slightly lesser) percentage of its ownership in the daily management of the station. The FCC also adopted the Review Board's conclusion that Genesis was entitled to a significant preference under the factor of diversification, despite the fact that BCI had disposed of the AM station it once owned before the hearing began. Genesis was assessed a moderate demerit as a consequence of the pattern of deliberate omissions, carelessness and inattention exhibited by it throughout the filing and prosecution of its application before the FCC; this demerit properly diminished the strength of the preferences earned by Genesis under the standard comparative criteria. *Broadcast Communications, Inc.,* 97 F.C.C.2d at 62-63.

In weighing all of these considerations, the FCC acted reasonably in concluding that the public would be better served by the grant of renewal of license to an existing broadcaster with a substantial record of past meritorious service as against an untried challenger whose comparative preferences were reduced by a pattern of disregard for agency rules and procedures. *Victor Broadcasting,* 722 F.2d at 765.

The basis for the agency's ultimate conclusion was explained clearly and was consistent with past agency decisions. The affirmance of the FCC's decision by the court

of appeals was in conformance with precedent and its responsibilities in review of agency decisions. There is thus no issue which warrants review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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